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No. 88-1629

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

GEORGIA ASSOCIATION FOR RETARDED CITIZENS, et. al,
Petitioners,

vs.

CHARLES McDANIEL, et. al,
Respondents.

BRIEF OF THE LOCAL SCHOOL BOARD RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTION PRESENTED

Whether, in view of constitutional obstacles including the separation of powers doctrine, the Handicapped Children's Protection Act of 1986 ("HCPA"), 20 U.S.C. §1415e, should be construed to apply retroactively to overturn a final, unappealed, district court order denying attorney's fees more than a year prior to the HCPA's enactment.

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JURISDICTION

Respondents do not contest that Petitioners have timely filed their petition for certiorari, however Respondents do not believe that any of the considerations under Rule 17 of the Supreme Court have been met.

STATEMENT OF THE CASE

The Local School Board Respondents ("Local Respondents") agree in substantial part with the Statement of the Case presented by Petitioners. However, the Local Respondents disagree with certain statements in Petitioners Statement of the Case which are also repeated in their brief and would add the following clarifications:

First, the Local Respondents would point out that the Petitioners achieved only a mixed success at best on the merits. Although the District Court issued an injunction in favor of Petitioners finding that Respondents should "consider" whether handicapped children in the plaintiff class might need extended school year services, the District Court refused to grant any relief to any individual plaintiffs

because the long processes of discovery and trial (during which a substantial portion of attorney's fees were incurred by both sides) showed that no one in the plaintiff class was in need of any relief. The Petitioners' cross appeal on these issues was denied. Georgia Association of Retarded Citizens v. McDaniel ("GARC"), 716 F.2d 1565, 1580-81 (11th Cir. 1983).

Confirming the limited nature of the Petitioners' success is the jurisdictional statement by these Petitioners in the response they filed earlier in this Court in Case No. 83-1431/1451 which argued that only "limited relief [was] afforded" the plaintiffs on the merits by the District Court. These facts are relevant to Petitioners' "fairness" argument in Part I(c) of the Petition.

Similarly, the Local Respondents wish to clarify that the Respondents were successful when the merits of the case were on appeal in that Petitioners' claim under Section 504 of the Rehabilitation Act was reversed. GARC v. McDaniel, 740 F.2d 904 (11th Cir. 1984).

The Local Respondents also disagree with Petitioners' proposition that the District Court's original Order of August 19, 1985 found that there was no right to attorneys' fees in this matter by considering only one statue, i.e., 42 U.S.C. §1988. In the District Court's 1985 Order denying attorney's fees, the Court wrote:

> Defendants object to the plaintiffs' request for attorneys' fees on the basis of the Supreme Court's decision in Smith v. Robinson, 468 U.S. _____, 104 S.Ct. 3457, 82 L.Ed. 2d 746 (1984). In Smith V. Robinson, the Supreme Court held that attorneys' fees are not awardable in an action arising under the Education For All Handicapped Children Act ("Handicapped Act"), 20 U.S.C. §1401, et seq., the

> only act under which plaintiffs ultimately prevailed in this case.

(Petition Appendix C) (emphasis added) (applying Smith v. Robinson, 468 U.S. 992 (1984).

Thus, the District Court's Order specifically denied that attorneys' fees were available under the Education For All Handicapped Children Act ("EHA"), the same act which has been amended by the Handicapped Children's Protection Act of 1986 ("HCPA") (20 U.S.C. §1415e) and under which Petitioners are presently seeking attorney's fees.

Finally, the Local Respondents would point out that footnote 2 of the Petition is both incorrect and irrelevant in arguing that Petitioners are entitled to attorney's fees for work on the appeals which arose prior to 1985. The disposition of the fee issue in 1985 would include disposition of fees for appellate

work connected with the original judgment on the merits.

REASONS FOR DENYING THE PETITION

A. Summary of Argument

The Petition should be denied because the Court of Appeals (and the District Court) properly held that the HCPA should not be construed to apply retroactively to overturn the final, unappealed District Court order of August 19, 1985 in view of the serious constitutional difficulties which would be encountered with such an application. There is absolutely no conflict among the circuits on this issue, and the Eleventh Circuit properly applied the principles enunciated by this Court including the principle against retroactive disruption of antecedent rights generally, the separation of powers principle which condemns legislative disturbance of final

judicial orders, and the principle that congressional enactments should not be construed in a manner creating serious constitutional difficulties unless absolutely necessary. Construing the Act as Petitioners have requested would unconstitutionally overturn the District Court's final, unappealed order entered more than a year prior to enactment of the HCPA. Such an intention is nowhere clearly expressed by the Act or its legislative history.

B. Argument

1. The Petitioners Incorrectly Assert a Conflict Among the Courts of Appeals.

There is absolutely no conflict among the Courts of Appeals on the issue of whether the HCPA can overturn final judgments as to attorney's fees. Nevertheless, Petitioners cite decisions in the Courts of Appeals for the Second,

Seventh, and Ninth Circuits and assert that the Court of Appeals' decision in the present case is inconsistent. (See Petition, pps. 49-51, citing Counsel v. Dow, 849 F.2d 731 (2d Cir. 1988), Tonya K. v. Board of Education of Chicago, 847 F.2d 1243 (7th Cir. 1988), and Abu-Sahyun v. Palo Alto Unified School District, 843 F.2d 1250 (9th Cir. 1988).)

Petitioners are clearly incorrect in asserting this inconsistency. First, the Petitioners must concede that the cases cited did not involve any prior judicial order on the attorney's fees issue. The Petitioners make this concession with the inexact statement that "in each case fees were not explicitly addressed" (Petition, p. 49). Moreover, there is striking language in the Seventh Circuit's Tonya K. decision which underscores the importance of this distinction and reaffirms the decision of

the Court of Appeals in the present case.

In Tonya K. the district court had entered a consent decree on the merits, and the issue of attorney's fees was reserved. The plaintiffs withdrew the claim for attorney's fees in July 1984 and subsequently reasserted it under the HCPA. Describing the doctrine that rights obtained by judicial judgment are constitutionally vested, the Court of Appeals in Tonya K. explained the significance of the absence of a judicial order on attorney's fees as follows:

> If the plaintiffs had pressed their claim in July 1984 and lost, we would have a harder problem. The plaintiffs argue that a reopening under Rule 60(b) does not interfere with vested rights because every judgment is subject to such reopening. On this view, however, there are no "rights" of any kind, and every decision fixing interests in property is forever malleable. We doubt that the Supreme Court would take that view, unless it is willing to overrule Hodges, O'Grady, and Wheeling & Belmont Bridge and jettison the doctrine. The plaintiffs did not press their

> claim, however; they withdrew it. There has never been a judicial disposition of the request for fees. The withdrawal in July 1984 is the equivalent of dismissing a suit without prejudice, then refiling it if the law takes a change in the plaintiff's favor.

Tonya K., 847 F.2d at 1248. Accord, Max M. v. New Trier High School District No. 203, 859 F.2d 1297, 1299 (7th Cir. 1988) (emphasizing that the lower court "wrapped up the litigation without addressing questions concerning fees").

It is clear that the Seventh Circuit's reasoning is completely consistent with the Eleventh Circuit's reasoning in the present case and that both courts see no reason for this Court to overrule the longstanding series of Supreme Court cases cited above by the Seventh Circuit. Interestingly, the Eleventh Circuit opinion in this case approvingly discusses the Seventh Circuit's Tonya K. decision which the

Petitioners claim is inconsistent. See, GARC v. McDaniel, 855 F.2d 805, 810, 812-13 (11th Cir. 1988).[1]

Thus, it is apparent that Petitioners' assertion of an inconsistency among the Circuits is merely an attempt to manufacture grounds for the granting of the writ of certiorari. In contrast, the decisions of the other Courts of Appeals are not only consistent with the decision herein but further confirm that the Eleventh Circuit's decision was correct.

---

[1]It is also worth noting that petitioners could have equally well cited as "inconsistent" the Fifth Circuit's decision in Fontenot v. Louisiana, 805 F.2d 1222 (5th Cir. 1986) as they did in the Court of Appeals. However, the Court of Appeals herein carefully and thoroughly distinguished Fontenot as another case where there was no unappealed judicial order finalizing the attorney's fees issue.

2. The Petitioners Incorrectly Assert That Congress' Intent as to Unappealable Cases is Unambiguous.

The Petitioners contend that the Court of Appeals "ignored unambiguous Congressional intent" with respect to whether the HCPA would apply to overturn unappealable judicial orders regarding attorney's fees. (Petition, p. 14, 15-21). To the contrary, however, the statute itself is silent on this issue, and the legislative history cited by Petitioners is ambiguous at best.

Although Petitioners cite the comments of a few Congressmen to the effect that the HCPA would assist plaintiffs in preenactment proceedings which were "successfully resolved" after Smith v. Robinson or whose fee petitions were "rejected," these comments do not discuss plaintiffs with unappealable fee claims (a group which included the

plaintiffs in Smith v. Robinson itself). Instead, these comments would of course comprehend those plaintiffs whose cases were "successfully resolved" on the merits and whose fee claims were rejected because of Smith and were then appealed, reserved, or otherwise withdrawn (a group which would include such plaintiffs as those in Fontenot, Tonya K., Counsel, and Abu-Sahyun).

It is certainly far from clear that Congress intended that plaintiffs in unappealable fee cases (which would include the plaintiffs in Smith v. Robinson under the Petitioners' reading) would be able to ignore the final, unappealed orders which they had obtained against them. If Congress had so intended, it could have and should have expressly stated that the plaintiffs in such cases were entitled to some form of relief. The rationale of the Court of

Appeals in Daylo v. Administrator of Veterans' Affairs, 501 F.2d 811 (D.C. Cir. 1974) is applicable here:

> Certainly we cannot hold that 38 U.S.C. §3111 applies to final judgments merely because no express exemption for such judgments is carved into the provision. Such an exemption is rarely if ever contained in new legislation. The exemption is to be assumed unless the legislature speaks clearly to the contrary.

Id. at 822-23 (emphasis added).

In Daylo part of the law reviewed was expressly made retroactive to 1940 (a 30-year period of retroactivity), yet the Court of Appeals refused to consider the law to be applicable to unappealable, final judgments because of the "serious constitutional problems which such an intent would raise." Id. at 823. Even though Congress expressly made the HCPA retroactive to cases pending or brought on or after July 4, 1984, "Congress might well have thought that, absent such

language, the amendment would be judicially construed to apply only prospectively." Daylo, 501 F.2d at 819. See, Greene v. United States, 376 U.S. 149, 160 (1964) (federal legislation must be considered prospective unless contrary Congressional intent is manifest).

Congress made the HCPA retroactive to July 4, 1984 because of Congress' displeasure with the Supreme Court's decision on July 5, 1984 in Smith v. Robinson. Thus, Congress simply ensured that the law could apply to cases pending or brought from that date forward. However, nowhere does the Act state that it is applicable to unappealable, final judgments rendered between July 4, 1984 and the August 4, 1986 date of enactment. Indeed, to follow Petitioners' construction of the HCPA would mean that the Act had the effect of reversing by legislative fiat the outcome between the

parties in Smith v. Robinson itself, a result nowhere suggested by the Act and clearly impermissible as a blatant legislative attempt to reverse the outcome of specific cases.

Thus, because Congress nowhere clearly expressed an intent to reverse unappealable judgments, the Court of Appeals for the Eleventh Circuit properly held that the serious constitutional difficulties associated with such an interpretation require that the Act be construed otherwise. The Court of Appeals properly followed several principles enunciated by this Court including, first, the principle

> that a retrospective operation not be given to a statute which interferes with antecedent rights . . . unless such be 'the unequivocal and inflexible import of the terms, and the manifest intention of the legislature.'

United States v. Security Industrial Bank, 459 U.S. 70, 79 (1982) quoting Union

Pacific R. Company v. Laramie Stock Yards Company, 231 U.S. 190, 199 (1913).

In addition to this principle regarding antecedent rights in general, the present case also invokes the constitutional principle of the separation of powers because Petitioners sought on August 26, 1986 to use the HCPA to overturn a final, unappealable court judgment on attorney's fees entered more than a year earlier on August 19, 1985. This Court has clearly stated:

> It is not within the power of the legislature to take away rights which have been once vested by judgment. Legislation may act on subsequent proceedings, may abate actions pending, but when those actions have passed into judgment the power of the legislature to disturb the rights created thereby ceases.

McCullough v. Virginia, 172 U.S. 102, 123-24 (1898).

The third principle enunciated by this Court, and properly recognized by the

Court of Appeals, is the rule that the Court of Appeals is obliged, whenever it is "fairly possible," to construe a statute in a manner that does not call that statute into constitutional doubt. See, GARC, 855 F.2d at 808 citing Crowell v. Benson, 285 U.S. 22, 62 (1932); Califano v. Yamasaki, 442 U.S. 682, 693 (1979).

Recognizing that Congress intended that the HCPA be retroactive, the Court of Appeals in this case properly applied the above principles to conclude that Congress nowhere expressed the clear intention that the scope of the retroactivity would include the overturning of unappealable court judgments. The Petitioners present no good reason for disturbing the Court of Appeals' application of the above principles to this case.

3. The Petitioners Incorrectly Assert that the Eleventh Circuit Articulated a Rule with No Exceptions.

The Petitioners repeatedly accuse the Eleventh Circuit of articulating a per se rule against retroactive legislation which has an impact on prior judicial judgments. (Petition, p. 13, 31, 40-41). To the contrary, however, the Court of Appeals carefully discussed the recognized exceptions to the general rule. See, GARC, 855 F.2d at 811-812. The Court of Appeals explained that such exceptional cases include those where the United States was a party to the prior judgment and Congress has chosen to waive the res judicata effect of the prior judgment which it had previously enjoyed. The exceptional cases also include those concerning "public rights" and equitable decrees.

The present case clearly does not fall within the first of these groups of

exceptional cases, and Petitioners do not suggest otherwise. (Utter v. Franklin, 172 U.S. 416 (1899), cited by Petitioners, appears to fall into this category in that the U.S. Territory of Arizona volunteered to take on the obligation of bonds previously declared void.)

The Petitioners do fleetingly suggest that this case "should fall within the class of 'public rights' cases which justify retroactive application." (Petition, p. 34 citing Bradley v. School Board of the City of Richmond, 416 U.S. 696 (1974) and Frankel v. Commissioner of Education, 480 F.Supp. 1156 (S.D.N.Y. 1979)). However, the district court decision in Frankel, decided in 1979, has nothing to do with attorney's fees under the HCPA, and this Court's decision in Bradley is not at all on point because that case involved attorney's fees legislation which was enacted during the

pendency of the litigation as conceded by the Petitioners. (Petition, p. 34).

Just as in Bradley, the legislation considered in Carpenter v. Wabash Ry. Co., 309 U.S. 23 (1940), also cited by Petitioners, was enacted while the case was still on appeal, so there was no separation of powers issue there either. The Court in Carpenter described the case as an ongoing set of bankruptcy proceedings where "[t]here is no suggestion that the present proceeding had been terminated prior to the enactment of the amendment or that it is not now pending." Id. at 29. Similarly distinguishable cases are Shung v. Brownell, 227 F.2d 40 (D.C. Cir. 1955)(previous "judgment settled nothing, since it was vacated"); Gaines v. Dougherty County Bd. of Educ., 775 F.2d 1565, 1569 (11th Cir. 1985) (previous orders on attorney's fees were deemed vacated and attorney's fees

issue postponed); and Shannon v. United States Dept. of H.U.D., 433 F.Supp. 249, 251 (E.D. Pa. 1977) (attorney's fees considered under pending cost petition and allowed on separate, substantive (Title VI) claim).

Describing the exceptional cases where subsequent legislation has been permitted to impact upon judgments involving public rights, the Court of Appeals in Daylo explained:

> What appears to unite these cases is that the injunctive decrees at issue were 'legislative' in function, attempting to control the legal status of a variety of future actions which the parties, or others, might or might not wish to take.
>
> 'The distinction is between restraints that give protections to rights fully accrued upon facts so nearly permanent as to be substantially impervious to change, and those that involve the supervision of changing conduct or conditions and are thus provisional and tentative.'

Daylo, 501 F.2d at 818 (citations omitted).

This explanation is likewise found in cases cited by Petitioners and shows that those cases do not support the Petitioners. Thus, in Fleming v. Rhodes, 331 U.S. 100 (1940) this Court found that legislation could permit an injunction against future proceedings for evictions after the landlord appellees had acquired eviction judgments and the legislation subsequently made such evictions unlawful. The Court in Fleming explained: "Federal regulation of future action based upon rights previously acquired by the person regulated is not prohibited by the Constitution." Id. at 107. To similar effect is the decision in West Coast Life Insurance Co. v. Merced Irr. Dist., 114 F.2d 654, 661 (9th Cir. 1940).

Equally inapplicable to the present case are the cases cited by

Petitioners involving due process challenges to retroactive legislation. The Court of Appeals in the present case recognized that the constitutional dimension of the rights vested by a court judgment is two-fold: first, that rights fixed by a court judgment are a form of property entitled to constitutional protection; and second, that the constitutional doctrine of the separation of powers protects the judicial action from superior legislative review. See, GARC, 855 F.2d at 810.

The cases cited by Petitioners for the proposition that "due process is satisfied" did not involve this second constitutional dimension of the separation of powers doctrine. (See Petition, p. 44, citing Pension Benefit Guarantee Board v. R.A. Gray & Co., 467 U.S. 17 (1984); Counsel v. Dow, 849 F.2d 731 (2nd Cir. 1988); and School Board of Prince William

County v. Malone, 662 F.Supp. 999 (E.D.Va. 1987)). Likewise, this Court's decision in Paramino Lumber Co. v. Marshall, 309 U.S. 370 (1940), also cited by Petitioners, was a due process challenge to legislation impacting an administrative agency decision rather than a court judgment. Thus, the Court stated:

> Nor can we say that this legislation is an excursion of the Congress into the judicial function. 25/
>
> 25/ . . . the state cases cited by appellants upon the question of the invasion of judicial authority involved statutes affecting judicial judgments rather than administrative orders and are therefore inapplicable . . .

Id. at 381.

The Petitioners' misunderstanding of the separation of powers problem presented in this case is evident in their argument that "a statute does not present a separation of powers issue so long as the statute does not dictate a rule of decision in a specific case or mandate a

judicial resolution of specific facts." (Petition, p. 46 citing, but not quoting, United States v. Sioux Nation of Indians, 448 U.S. 371 (1980); Moore v. D.C., 666 F.Supp. 263 (D.D.C. 1987), appeal filed, No. 88-7003 (D.C.Cir.); and School Board of Prince William County v. Malone, 662 F.Supp. 999 (E.D.Va. 1987)).

More precisely, this Court has explained that the separation of powers doctrine is violated if Congress either "disturbed the finality of a judicial decree" or prescribed "a rule for decision that left the court with no adjudicatory function to perform." Sioux Nation of Indians, 448 U.S. at 391 (emphasis added). As described above, the HCPA construction for which the Petitioners contend would, at a minimum, disturb the finality of the judicial decree involved in the present case.

The district court in School Board of Prince William County v. Malone, 662 F.Supp 999 (E.D.Va. 1987), cited by Petitioners, used a similar, erroneous analysis of the separation of powers doctrine. That court believed that the separation of powers doctrine could be violated only if the statute "prescribed a rule of decision in a pending case." Id. at 1000.

Likewise, the district court's decision in Capello v. District of Columbia, 669 F.Supp. 14 (D.D.C. 1987), also cited by Petitioners, is somewhat ambiguous, but it appears to take the view that the separation of powers principle applies only where legislation would in effect reverse a particular court's decision in a particular case. In the words of the district court:

> For legislation to be struck down because it encroaches on the power of the judiciary, it must dictate an

> outcome which reverses the Court's decision in the particular case.

Id. at 18 (emphasis added). In the present case the statutory construction urged by Petitioners would reverse the unappealed, final decision on attorney's fees in this particular case as well as reverse the outcome for the particular parties in the Supreme Court's Smith v. Robinson decision. Thus, Capello arguably repudiates rather than supports Petitioners' position.

A similarly erroneous, result-oriented decision appears in the district court decision in Yaris v. Special School District of St. Louis County, 661 F.Supp. 996 (E.D.Mo. 1987) also cited by Petitioners. The district court in Yaris never discussed the separation of powers doctrine and, instead, simply dismissed the defendants' concern about finality as "merely a corollary of the doctrine of

claim preclusion." Id. at 1000. Thus, the Yaris court completely omitted any discussion or recognition of the constitutional separation of powers issue.

In summary, it is clear that the Court of Appeals in the present case correctly articulated the general rule, and the exceptions, concerning the separation of powers problem invoked by legislation impacting judicial judgments.

4. The Petitioners Propose a Novel Balancing Test which is not Supported by the Case Law and Would not in any Event be Met by the Petitioners in this Case.

Petitioners repeatedly assert that "[a]nalysis of the permissible scope of a retroactive law requires a balancing test. . ." citing commentators, not cases, for authority. (Petition, p. 30-31). The Petitioners assert that such a balancing test must take into account several factors including the public interest

served by the statute, the extent to which the statute affects a preenactment right, and the nature of the preenactment right affected. (Petition, p. 30).

The Local Respondents submit that the Supreme Court cases discussed above do not call for any such balancing test in the present case and, furthermore, that Petitioners would in any event fail such a test. (Respondents submit that Petitioners have confused the balancing test for applying retroactive legislation to pending cases which do not present the separation of powers problem presented here. See, Bradley, 416 U.S. at 717).

The Petitioners describe the preenactment right affected by the HCPA as only "the right of the Defendants not to pay attorney's fees." (Petition, p. 35). The Local Respondents would submit that the preenactment right is much broader and includes the Respondents' right to rely on

a court judgment and the finality which it is constitutionally accorded.

The Petitioners also mischaracterize the Respondents' expectations by stating that "all the parties in the instant case expected that the Defendants would be liable for attorneys' fees if the Plaintiffs were successful." Id. To the contrary, from very early on in this litigation, the Respondents argued to the district court that all of the Petitioners' statutory claims were preempted by the exclusive remedies available under the EHA, a statute which did not provide for attorneys' fees. (These arguments are contained in the district court record in the May 20, 1980 Motion for Partial Judgment on the Pleadings as well as the August 22, 1980 Proposed Findings of Fact and Conclusions of Law, each submitted by the Local School Board Defendants). Thus,

to the Respondents, the decision in Smith v. Robinson was expected, not unexpected as argued by Petitioners.

Of course, the Respondents' expectations as to attorney's fees after the unappealed district court Order of August 19, 1985 (and even earlier after the July 5, 1984 Smith v. Robinson decision) quite justifiably included an expectation that the Respondents could not be liable for attorneys' fees in this case. The Petitioners' suggestion to the contrary, even as to the period after Smith v. Robinson, is clearly unfounded. (Petition, p. 39).

In making their "fairness" argument, Petitioners suggest that Petitioner families have incurred and paid attorney's fees in this litigation. (Petition, p. 33). However, Petitioners do not cite any record evidence of this assertion, and Respondents would point out

that Petitioners' suit was handled by government-funded legal services attorneys.

For the reasons discussed above, the Petitioners are clearly incorrect in asserting that the district court's decision denying attorneys' fees was nothing more than an unexpected windfall to the Respondents. In summary, because the Petitioners' balancing test argument relies so heavily upon their mischaracterization of the Respondents' preenactment right and the Respondents' expectations, the Petitioners' balancing test argument is unpersuasive as well as unsupported by the case law.

5. The Petitioners Incorrectly Assert that the HCPA Created a New, Independent Cause of Action for Attorneys' Fees.

The Petitioners argue again, as they did in the Court of Appeals, that the HCPA "created a new claim for attorneys'

fees" in the sense that it created a new cause of action. (Petition, p. 54-60). However, as the Court of Appeals in this case succinctly explained:

> Strictly speaking, the HCPA does not create a 'cause of action' or a substantively independent 'claim' for attorneys' fees.

GARC, 855 F.2d at 811.

Furthermore, the Petitioners repeatedly mischaracterize the district court's August 19, 1985 Order denying attorneys' fees as an Order "under a different statute," specifically 42 U.S.C. §1988. (Petition, p. 12, 59). To the extent that Petitioners are suggesting that the district court did not consider the availability of fees under the EHA (which was later amended by the HCPA), this is incorrect. Thus the district court's August 19, 1985 Order stated:

> . . . attorneys' fees are not awardable in an action arising under the Education for all Handicapped Children Act ('Handicapped Act'), 20

> U.S.C. §1401, et seq., the only act under which plaintiffs ultimately prevailed in this case.

Order of August 19, 1985. (Petition Appendix c).

For all these reasons, the Petitioners' argument that the HCPA created a new, independent claim for attorneys' fees is insupportable.

CONCLUSION

For all the reasons stated herein, Petitioners have not demonstrated any error below or conflict among the Circuits which would warrant a writ of certiorari. Accordingly, the Petition should be dismissed.

Respectfully submitted,

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